BRB No. 89-2118

MATTHEW VODANOVICH, III	)	
	)	
Claimant	)	
	)	
v.	)	
	)	
FISHING VESSEL OWNERS MARINE WAYS, INCORPORATED	)	
	)	
and	)	
	)	
HOME INSURANCE COMPANY	)	
	)	
Employer/Carrier Respondents	)	
	)	
PACIFIC FISHERMEN, INCORPORATED	)	
	)	
and	)	
	)	
INSURANCE COMPANY OF NORTH AMERICA	)	DATE ISSUED:
	)	
Employer/Carrier-Petitioners	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-interest	)	DECISION and ORDER

Appeal of the Order and Final Decision and Order Awarding Benefits of James J. Butler, Administrative Law Judge, United States Department of Labor.

Thomas Owen McElmeel (McElmeel & Schultz), Seattle, Washington, for Pacific Fishermen, Inc.

Robert H. Madden and Steven T. Russell (Madden & Crockett), Seattle, Washington, for Fishing Vessel Owners Marine Ways, Inc.

Samuel J. Oshinsky (Thomas S. Williamson, Jr., Solicitor of Labor; Carol DeDeo, Associate

Solicitor; Janet R. Dunlop, Counsel for Longshore), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

Before: DOLDER, Acting Chief Administrative Appeals Judge, SMITH and McGRANERY, Administrative Appeals Judges.

PER CURIAM:

Pacific Fishermen, Incorporated (Pac Fish) appeals the Order and Final Decision and Order Awarding Benefits (86-LHC-295) of Administrative Law Judge James J. Butler rendered on a claim filed pursuant to the provisions of the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. §901 et seq. (the Act). We must affirm the findings of fact and conclusions of law of the administrative law judge which are rational, supported by substantial evidence, and in accordance with law. *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc*., 380 U.S. 359 (1965); 33 U.S.C. §921(b)(3).

On February 20, 1979, while claimant was working as a caulker on the premises of Pac Fish, the aluminum scaffolding upon which he and a co-worker were standing collapsed, causing him to fall and seriously injure his right leg, ankle and back. The two caulkers had been loaned to Pac Fish by Fishing Vessel Owners Marine Ways, Incorporated (Fishing Vessel), claimant's regular employer, for the duration of Pac Fish's work overhauling a vessel, the *M/V CHENA*. Claimant had been working at Pac Fish for four days when the accident occurred. Claimant's most recent in a series of surgeries occurred in December 1985, and as of the time of the administrative law judge's October 1987 decision, he remained temporarily totally disabled.

In January 1982, claimant commenced a third-party tort action against Pac Fish in King County Superior Court in the state of Washington to recover for his injuries. Pac Fish moved for summary judgment, arguing that as it was claimant's Longshore Act employer, it was immune from suit in tort. *See* 33 U.S.C. §905. On September 19, 1984, the superior court issued an order granting Pac Fish's motion, in which it found that as claimant was a borrowed servant of Pac Fish, it was his employer and his exclusive remedy was therefore under the provisions of the Longshore Act. *Vodanovich v. Pacific Fisherman, Inc.*, No. 82-2-00476 (Sept. 19, 1984). This opinion was subsequently affirmed by the Washington Court of Appeals on March 9, 1987. *Vodanovich v. Pacific Fisherman, Inc.*, No. 15439-7-I (Wash. Ct. App. March 9, 1987)(unpublished). On June 2, 1987, the state supreme court declined to review the case.

While the state claim was pending, claimant filed a claim against Fishing Vessel under the Longshore Act for the same incident. After voluntarily paying claimant $96,694.72 in benefits, Fishing Vessel sought an order from the administrative law judge finding Pac Fish to be the liable employer under the Act and requiring that Pac Fish indemnify Fishing Vessel for the benefits it previously paid together with interest and an attorney's fee.

In his initial Decision and Order dated October 16, 1987, the administrative law judge stated that claimant was temporarily totally disabled and that the issue before him concerned determining the employer liable for past and future benefits. The administrative law judge initially held that as the courts of the state of Washington had conclusively determined that claimant was the borrowed servant of Pac Fish, the doctrine of collateral estoppel precluded re-litigation of this question. Accordingly, the administrative law judge found that Pac Fish was claimant's employer and was solely responsible for claimant's benefits under the Act. The administrative law judge further found that even if he were to ignore the collateral estoppel effect of the state judgement, Pac Fish would be the liable employer under the Longshore Act based on his analysis of the factors relevant to determining employee status, as claimant was a borrowed employee of Pac Fish at the time of his injury. The administrative law judge in addition held that this was not a case of dual or joint employment. Thus, Pac Fish was held solely liable for past and future benefits. The administrative law judge then remanded the case to the district director for a determination of the benefits due claimant and reimbursable to Fishing Vessels. Following issuance of a letter by the district director regarding the benefits due, the administrative law judge issued an Order dated June 5, 1989, reaffirming his previous decision and specifically stating the amounts due.[1] This appeal by Pac Fish followed.

On appeal, Pac Fish contends that the administrative law judge lacked the authority to join it as a party and order it to reimburse Fishing Vessels. Pac Fish asserts that it could not be joined, as no claim had been filed against it by claimant prior to the administrative law judge's initial Decision and Order. Pac Fish further contends that Fishing Vessel, the lending employer, should be held solely responsible for claimant's compensation and medical expenses, or alternatively, that liability should be apportioned between the two employers in a percentage equal to the specific economic benefit each derived from claimant's efforts. Fishing Vessel responds, urging that the administrative law judge's determination that Pac Fish is solely responsible for claimant's benefits be affirmed. The Director, Office of Workers' Compensation Programs (the Director), also responds, asserting that the administrative law judge acted within his discretion in ordering Pac Fish to reimburse Fishing Vessel and properly accorded collateral estoppel effect to the state court's determination that Pac Fish was claimant's employer. The Director disagrees, however, with the administrative law judge's determination that Pac Fish would be claimant's employer even absent application of the doctrine of collateral estoppel, asserting that independent analysis of the relevant factors results in a determination that Fishing Vessel was claimant's employer. Both Pac Fish and Fishing Vessel filed replies to Director's brief.

Initially, we reject Pac Fish's contention that the administrative law judge lacked the authority to order Pac Fish to reimburse Fishing Vessel for claimant's compensation. Pac Fish

[1]This Order followed an attempt by Pac Fish to appeal the administrative law judge's initial decision to the Board, which the Board dismissed on the basis that the decision was not final, as it remanded the case for findings necessary to an award. In its Order of December 29, 1988, the Board noted that the issues which Pac Fish wished to raise could be asserted in an appeal filed once a final decision regarding entitlement was issued by the administrative law judge.

asserts that claimant did not file a claim against it and therefore Fishing Vessel lacked standing to seek reimbursement from it for the voluntary payments made. The administrative law judge found that Section 18.29(a)(7) of the Rules of Practice and Procedure for the Office of Administrative Law Judges, 29 C.F.R. § 18.29(a)(7), allows him to take any appropriate action authorized by the Federal Rules of Civil Procedure. The administrative law judge then found that under Rule 14(c) of the Federal Rules, FED. R. CIV. P. 14(c), in admiralty and maritime claims the defendant may implead another party (third-party defendant) against whom the claimant has not asserted a claim and demand that party be found liable, both to the original defendant and directly to the claimant. Moreover, the Board has previously recognized that an administrative law judge has all powers, duties and responsibilities necessary to resolve claims under the Act and that claims for reimbursement of an employer or carrier raise questions in respect to compensation claims. *See Abbott v. Universal Iron Works, Inc.*, 23 BRBS 196 (1990), *aff'd and modified on recon.*, 24 BRBS 169 (1991); 33 U.S.C. §919(a). *See also Aetna Life Insurance Co. v. Harris*, 578 F.2d 52 (3d Cir. 1978); *Quintana v. Crescent Wharf and Warehouse Co.*, 19 BRBS 52, 53 (1986), *modifying* 18 BRBS 254 (1986); *Ozene v. Crescent Wharf and Warehouse Co.*, 19 BRBS 9 (1986); *Brady v. Hall Brothers Marine Corp. of Gloucester*, 13 BRBS 854 (1981). We accordingly conclude that the administrative law judge had the authority to join Pac Fish as a party in this case and acted within his discretion in doing so. *See generally* 20 C.F.R. §702.338.

Although Pac Fish also asserts that Fishing Vessel lacked standing to seek reimbursement on the basis that claimant did not make a timely and proper claim against it prior to the administrative law judge's initial Decision and Order, we note that this issue is moot; claimant filed a claim against Pac Fish prior to the administrative law judge's final June 5, 1989 Order. On May 31, 1988, claimant's attorney wrote to the district director asking that his letter be construed as a claim against Pac Fish. Any letter or notice to the deputy commissioner from which it may be reasonably inferred that a claim for compensation is being made is sufficient to constitute a claim under the Act. *Bingham v. General Dynamics Corp.*, 14 BRBS 614 (1982). While Pac Fish also contends that even if this letter does constitute a proper claim, the case must be remanded for the administrative law judge to determine if it was timely, we disagree. The claim against Pac Fish was filed within one year from the date that claimant's third party tort action was finally dismissed on the merits, *i.e.*, within one year of the Washington Supreme Court's refusal to grant review on June 2, 1987. The claim is timely as a matter of law pursuant to Section 13(d) of the Act. 33 U.S.C. §913(d).[2] *See*

[2]Section 13(d) provides

> Where recovery is denied to any person in a suit brought at law or in admiralty to recover damages in respect of injury or death, on the ground that such person was an employee and the defendant was an employer within the meaning of this chapter, and that such employer had secured compensation to such employee under this chapter, the limitation of time prescribed in subsection (a) of this section shall begin to run only from the date of termination of such suit.

Calloway v. Zigler Shipyards, Inc., 16 BRBS 175 (1984). Moreover, as Fishing Vessel continued to make voluntary payments, the Section 13(a) statute of limitations would not commence until one year from the last payment of compensation. *See generally Krotsis v. General Dynamics Corp.*, 22 BRBS 128 (1989), *aff'd sub nom. Director, OWCP v. General Dynamics Corp.*, 900 F.2d 506, 23 BRBS 40 (CRT)(2d Cir. 1990). Pac Fish's argument that the administrative law judge did not have the authority to join it as a party and order it to reimburse Fishing Vessel is therefore rejected.[3]

Turning to the issue of whether the administrative law judge properly found that Pac Fish is claimant's employer and therefore liable for the benefits due in this case, we affirm his decision to find Pac Fish liable as claimant's employer under the doctrine of collateral estoppel.[4] Although the United States Court of Appeals for the Ninth Circuit, under whose appellate jurisdiction this case arises, has stated that the doctrine of collateral estoppel or issue preclusion is not to be mechanically applied, the court has also recognized that collateral estoppel can prevent the waste of judicial resources and shield litigants from duplicative and often vexatious lawsuits in proper circumstances. *Western Oil and Gas Ass'n v. United States Environmental Protection Agency*, 633 F.2d 803 (9th Cir. 1980). Both the Board and the Ninth Circuit have specifically recognized that the doctrine of collateral estoppel precludes litigation by the parties of issues actually litigated and necessary to the outcome of the first action. *See Levi Strauss & Co. v. Blue Bell Inc.*, 778 F.2d 1352, 1357 (9th Cir. 1985) (*en banc*); *Kollias v. D & G Marine Maintenance*, 22 BRBS 367 (1989). In order for collateral estoppel effect to be given to a finding in a state court proceeding by an administrative law judge deciding a claim under the Act, the same legal standards must be applicable in both forums. *See, e.g., Smith v. ITT Continental Baking Co.*, 20 BRBS 142 (1987).

In this regard, the state court applied the same standards to determining claimant's status as a

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33 U.S.C. §913(d).

[3]Citing *Glass v. Stahl Specialty Co.*, 97 Wash.2d 880, 652 P.2d 948 (1982), Pac Fish contends that the administrative law judge's ruling requiring reimbursement is the equivalent of requiring contribution. Pac Fish argues contribution is impermissible under Washington state law absent an agreement to the contrary. The issue in *Glass* was whether an equipment manufacturer was entitled to contribution from an employer when a workman sues the manufacturer for injuries suffered on the job as a result of the alleged concurrent negligence of the employer and manufacturer. As *Glass* holds only that an employer cannot be liable for contribution in a tort case under Washington state law absent a specific indemnification agreement, we reject Pac Fish's assertion that the administrative law judge's Decision and Order joining Pac Fish as a potential employer in this Longshore Act case was an impermissible use of contribution violative of Washington law.

[4]We further agree with the administrative law judge that Pac Fish would also be estopped from arguing that Fishing Vessel is the employer based on equitable principles. Pac Fish argued strenuously at the state court level that it was claimant's Longshore Act employer, and the administrative law judge reasonably determined that Pac Fish should not be able to use its status as borrowing employer both as a shield and as a sword.

borrowed employee that have been applied in cases under the Act. The state court explicitly applied the relevant factors set forth in *Ruiz v. Shell Oil Co.*, 413 F.2d 310 (5th Cir. 1969), and *Gaudet v. Exxon Corp.*, 562 F.2d 351 (5th Cir. 1977), *cert. denied*, 436 U.S. 913 (1978). This nine factor test has previously been recognized by the Board as an acceptable method for determining employer liability in the borrowed employee situation. *Edwards v. Willamette Western Corp.*, 13 BRBS 800 (1981). *See also Capps v. N. L. Baroid -NL Industries, Inc.*, 784 F.2d 614 (5th Cir. 1986), *cert. denied* 479 U.S. 838 (1986).[5] The question of whether Pac Fish is claimant's employer presents a mixed question of law and fact which was actually and necessarily litigated at the state level. As such determinations are entitled to collateral estoppel effect, where, as here, the legal standard employed by the state court is the same as that employed under the Longshore Act, the administrative law judge's determination that Pac Fish was collaterally estopped from re-litigating its status as claimant's employer at the time of the injury in this case is affirmed. *See Barlow v. Western Asbestos Co.*, 20 BRBS 179, 180 (1988). In light of our determination that the administrative law judge properly applied collateral estoppel, we need not consider whether he properly determined that Pac Fish was claimant's borrowing employer based on his evaluation of relevant factors.

Pac Fish's alternate argument that the administrative law judge erred in failing to apportion liability between the two employers based on the economic benefit each derived similarly must fail. Pac Fish contends that the administrative law judge misconstrued *Edwards* in finding that this was not a case of dual or joint employment because he indicated that "the borrowed servant situation must be distinguished from the *dual* or *joint* employment situation." Decision and Order at 14. Although *Edwards* explicitly recognizes that joint liability may be appropriate in the borrowed employee situation where the administrative law judge applies the same test to each of two potentially responsible employers and finds that each employer satisfies the applicable criteria, this holding does not affect the outcome in this case. The administrative law judge applied the factors set forth in A. Larson, *Workmen's Compensation Law*, §48, which the Board recognized as appropriate in *Edwards*, and found that the facts in this case do not establish dual or joint employment. Decision and Order at 14, 16. The administrative law judge determined that because claimant was not under the simultaneous control of two employers at the time of his injury or under contract to two employers and under the separate control of each, he was not involved in dual or joint employment, consistent with the factors in Professor Larson's treatise. The administrative law judge further

[5]The *Ruiz-Gaudet* test lists the following questions for determining if employee is a borrowed servant: (1) who has control over the employee and the work he is performing, other than mere suggestions of details or cooperation; (2) did the employee acquiesce in the new work situation; (3) who furnished tools and place for performance; (4) who had the right to discharge the employee; (5) who had the obligation to pay the employee; (6) did the original employer terminate his relationship with the employee; (7) whose work was being performed; (8) was there an agreement or meeting of the minds between the original and borrowing employer; and (9) was the new employment over a considerable length of time. The Fifth Circuit has held that the principal focus of the *Ruiz-Gaudet* test should be whether the second employer itself was responsible for the working conditions experienced by the employee and the risks inherent therein, and whether the employment with the new employer was of sufficient duration that the employee could reasonably be presumed to have evaluated the risks of the work situation and acquiesced thereto. *Gaudet*, 562 F.2d at 357.

determined that even if the present case were deemed to involve dual employment rather than a true borrowed employee situation, liability would fall on Pac Fish because it alone had control of claimant's work and work place and claimant was engaged solely in Pac Fish's work at the time of the accident. The administrative law judge's findings regarding dual or joint employment accord with the state court's determination that Pac Fish alone had the right to control claimant's work under the *Ruiz* test. As the administrative law judge committed no error in applying appropriate legal standards for dual or joint employment to the facts in this case, his determination that Pac Fish is solely liable for claimant's benefits is affirmed.

Accordingly, the Order and Final Decision and Order Awarding Benefits of the administrative law judge are affirmed.

SO ORDERED.

NANCY S. DOLDER, Acting Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge